> may leave something which still has to be determined, but then that determination must be determination which does not depend upon the agreement between the parties."

The Full Court stated that the present situation was distinguished from a contract made by parties leaving an essential term to be agreed upon by them, and if they failed to agree, where the disputed term is to be determined by a third party or by arbitration.

The Full Court also stated that the law does not permit a court to imply a term into a bargain between parties for the purposes of making their bargain an enforceable contract.

- John Tyrril

13. Contract Formation - Battle of Forms - Attempt to Incorporate Lump Sum Contract E5b in a Subcontract

As an example of the problem of subcontract formation in the construction industry mentioned above in the comment on *Australian and New Zealand Banking Group Ltd v Frost Holdings Ltd*, the relevant facts and findings in *White Industries Pty Ltd v Piling Contractors Pty Ltd* (1986) 7 BCLRS 172 are set out below in some detail.

White Industries entered into an agreement with Dravo Corporation for the construction of an aluminium smelter and ancillary facilities at Tomago. In December, 1981, Piling Contractors was invited by White Industries to submit quotations as a subcontractor for the driving of sheet and steel piles for the erection of cofferdams at the smelter site. White Industries provided Piling Contractors with specifications and bore logs.

Piling Contractor's quotation included a statement that the offer was based "upon the attached general working conditions and the following". Attached was a document headed "Piling Contractors Pty Limited General Working Conditions", cl 13(c) of which provided as follows:

> "(c) The general condition [sic] of subcontract shall be as per the standard, unedited M.B.A. Edition 5b with our quotation and general working conditions taking precedence."

After a number of communications between the parties, Piling Contractors submitted a revised quotation.

On 22 February, 1982, White Industries sent a telex to Piling Contractors accepting Piling Contractor's offer subject to certain terms. On 23 February, 1982, Piling Contractors replied to this telex confirming that it was prepared to discuss a proposed equipment charge, as required by White Industries in its telex, and confirming that the other terms were acceptable.

Piling Contractors entered the site in March, 1982 and commenced work with the knowledge and assent of White Industries. Work continued until the latter part of April, 1982 when it ceased following difficulties experienced by Piling Contractors in driving piles. Piling Contractors claimed that these difficulties related to ground conditions not properly disclosed. Differences developed between the parties as to what, if any, compensation should be allowed to Piling Contractors.

After work had been in progress for two to three weeks, White Industries had sent a "formal order" to Piling Contractors. This order contained the words: "the above work is to be carried out subject to the terms and conditions printed on the reverse." Paragraph 1(b) of these terms was as follows:

> "(b) Any conditions of contract or sale attached to or embodied in the Sub-Contractor's quotation are deemed to be withdrawn in favour of the conditions incorporated herein."

This document was never signed by Piling Contractors, which claimed that it was inconsistent with the agreement already established between the parties.

It was common ground that the reference to cl. 13(c) of Piling Contractor's General Working Conditions was to Lump Sum Contract Edition 5b issued by the RAIA and MBFA. Clause 32 of that contract provided for reference to arbitration of disputes between the proprietor and the builder.

Upon the assumption that cl. 32 constituted a term and condition of the subcontract between White Industries and Piling Contractors, Piling Contractors gave notice to White Industries on 30 March, 1983 that a dispute existed between them with regard to the subcontract and required that the dispute be resolved by arbitration under cl. 32 of Edition 5b.

Master Allen in the Supreme Court of New South Wales held that the contract between the parties was concluded by Piling Contractor's letter of 23 February, 1982, although the parties contemplated that a formal document would be executed. Accordingly, the terms and conditions on the reverse of White Industries' form constituted no part of the contractual arrangements between the parties.

Master Allen further held that cl. 13 of Piling Contractors' General Working Conditions formed part of the contractual arrangements between the parties, with the effect of incorporating cl. 32 of Edition 5b. Master Allen also held that cl. 32 constituted a submission to arbitration within the meaning of the Arbitration Act 1902 (NSW). Finally, Master Allen held that there was no discretionary basis on which a stay of proceedings should be refused.

White Industries appealed from this decision.

In the appeal, Carruthurs J. held:

1. The "battle of forms", to use the expression of Lord Denning in *Butler Machine Tool Co. Ltd v Excell-o Corporation (England) Ltd* (1979) 1 WLR 401 at 404, was completed by *Piling Contractor's* letter of 23 February, 1982. Albeit, that if it were necessary to use a diesel hammer because another machine was inadequate, the cost of such hammer was to be the subject of negotiation. The parties had reached agreement upon all the essential

terms for driving the piles at this date.

2. There was no apparent purpose to the purported incorporation of the provisions of Edition 5b since *Piling Contractors* was acting as a subcontractor and the document was completely inappropriate to such a situation. Edition 5b is predicated upon the basis that the proprietor has retained an architect. Indeed, cl. 3 of Edition 5b imposes an obligation upon the proprietor to appoint a new architect in the event that the original architect ceases to be the architect for the purposes of the contract. Any attempt to notionally remove the architect from Edition 5b renders the document meaningless.
3. The purported incorporation of the provisions of Edition 5b was very much a subsidiary matter. If cl. 13(c) could be ignored it could be still said that the parties had a meaningful arrangement.
   It is well established that where there is agreement upon all substantial terms, the Court may disregard a subsidiary term on the grounds that it is meaningless.
4. This was an appropriate case for application of the principle in *Nicolene Ltd v Simmonds* (1953) 1 QB 543, i.e. where a clause is so vague and uncertain as to be incapable of precise meaning and is clearly severable from the rest of the contract, the contract should be held good and the clause ignored.
   Independent of the attempted incorporation of Edition 5b, to which it was impossible to give any meaning, the parties had a comprehensive and intelligent agreement.
   Clause 13(c) of Piling Contractors General Working Conditions was meaningless and should in the circumstances be rejected.

Accordingly, Piling Contractors had not established a submission to arbitration and the appeal was allowed.

- John Tyrril

14. Contract - Penalty Clauses

Contracts frequently provide that upon one party committing a breach of contract, the other party can terminate the contract and recover damages. Should the damages be limited to the loss resulting from the breach, or should they include the loss resulting from the termination?

This problem was discussed by the High Court of Australia in *Esanda Finance Corporation Limited v Heinz Plessnig and Anor* (9th February, 1989). In that case, a finance company had terminated a hire purchase agreement on account of a breach, which was not serious enough to constitute repudiation of the contract.

The agreement provided that, upon termination, the finance company would be entitled to recover certain liquidated damages calculated according to a formula which included the value on sale of the repossessed equipment.

The Court found that the liquidated damages were not a penalty. The Court took into account the loss of benefit of the contract resulting from the finance company's election to terminate. The finance company was not limited to recovering only damages resulting from the breach of contract.

One basis upon which it was claimed that the liquidated damages clause was void as a penalty was that it did not include a provision that would require the finance company to make a refund to the hirer, if the value of the repossessed equipment on sale exceeded the finance company's loss from early termination of the contract. The absence of such a provision did not render the liquidated damages clause void. Deane J. mentioned that had in fact the finance company obtained an excess on the sale of the equipment, the hirers may have argued "under principles of unjust enrichment operating in all the circumstances of the case" to recover the amount of the excess.

Whilst the High Court's decision will make it difficult to challenge the validity of a liquidated damages clause on the ground that in particular hypothetical circumstances it could result in a windfall for the claimant, nevertheless, if a windfall should occur, then it may be worthwhile claiming back the windfall relying upon principles of unjust enrichment, mentioned by Deane J.

The case is of particular relevance in the interpretation of Clause 44 of the National Public Works Conference General Conditions of Contract. Under Clause 44, the Principal may, upon default of the Contractor, take over the work and recover the extra cost, if any, of completing the work. There is no provision for refund to the Contractor of any surplus.

- Philip Davenport

15. Copyright - Copying Concept or Idea

Ownit Homes Pty Ltd & Ors v *D. & F. Mancuso Investments Pty Ltd & Ors.*, Federal Court of Australia, Queensland Registry, 29 April, 1988.

Osman drafted plans for a display home by adapting two previous designs (known as Envoy Series Two). Osman was the managing director of Daudi Pty Ltd ("the draftsman"). That company had produced drawings for Ownit Homes Pty Ltd, ("Ownit"), including the Envoy Series Two design. Ownit constructed a display home using the Envoy Series Two design.

Mr and Mrs Mancuso ("the owners"), intended to build a house and visited the Envoy Series Two display. They obtained brochures containing details of the design. The owners took the brochures to a draftsman Mr Caruso. Mr Caruso drew plans of a house incorporating some of the basic concepts in the Envoy Series Two design. The owners requested changes to render the ultimate design closer to the Envoy Series Two.

Mancuso Investments Pty Ltd ("the Owners") then erected the house using this last design.